AVAILABILITY OF BANKRUPTCY COURTS TO MARIJUANA BUSINESSES

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I. Introduction

The Debtor is 92 years old, legally blind, and lives in an assisted living facility. She filed 11 to stop foreclosure of her commercial real property. One of the tenants at that property operated a marijuana dispensary on the premises and continued to pay rent to her post-petition. Her plan calls for her to sell the commercial real property to pay off all creditors in full.

The Debtor Pat Olson[1] is the general partner of Olson Bijou Center, L.P., a California limited partnership ("OBC"). OBC owns real property on Lake Tahoe Boulevard in South Lake Tahoe, California, known as the Olson Bijou Shopping Center (the "Shopping Center Property").

Starting in January 2013, Cody Bass began leasing space in the Shopping Center Property from OBC. The lease expressly authorized Mr. Bass to operate a "dispensary."[4] Pursuant to that authority, Mr. Bass operated at the leased premises Tahoe Wellness Cooperative ("TWC"), a marijuana dispensary authorized under California law.

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[1] The facts of this hypothetical are borrowed from In re Pat Olson, ___ B.R. ___ (Bankr. App. Panel, 2018).

Both the operation of the dispensary business and the leasing of the premises for such a business, however, potentially violated the federal Controlled Substances Act, 21 U.S.C. §§ 801-904 ("CSA"). The CSA classifies marijuana as a controlled substance, 21 U.S.C. § 812, and makes it unlawful to (1) knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance. The lease required Mr. Bass to "comply with all statutes, codes, ordinances, orders, rules and regulations of any Federal, California, municipal or other governmental or quasi governmental entity . . . ."

To further complicate matters, Mr. Bass and OBC entered into a letter of intent for Mr. Bass to purchase the Shopping Center Property for $4.2 million; Mr. Bass made a $25,000 payment to Debtor's attorney pursuant to the letter of intent. Shortly thereafter, Mr. Bass, OBC and Ms. Olson entered into an option agreement, which expired on March 3, 2016. Mr. Bass tendered an additional $50,000 to be applied to the purchase price, if the option were exercised.

According to Mr. Bass' declaration in support of his opposition to confirmation, he gave notice that he was exercising his option on April 1, 2016. He asserted that this notice was timely based on a First Amendment to Option Agreement attached to his declaration, which extended the deadline for exercising the option to April 4, 2016.

Ms. Olson, on the other hand, testified in her declaration that Mr. Bass came to her assisted living facility on March 3, 2016, the day the option agreement expired, and asked her to sign papers, but she did not understand what she may have signed, and she believed Mr. Bass misled her into "signing something." OBC and Ms. Olson did not perform under the option agreement.

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